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PEOPLE EX REL. CARTER *v.* RICE, SECRETARY OF STATE.[1]
COURT OF APPEALS OF NEW YORK.

SYLLABUS.

A constitutional provision, which requires the senate districts to contain, as nearly as may be, an equal number of inhabitants, and that the members of the assembly be apportioned among the several counties, as nearly as may be, according to the number of their respective inhabitants, necessarily vests a discretion in the legislature in making the apportionment, and it will not be interfered with by the courts unless it is plainly and grossly abused.

In deciding whether or not the legislature has abused its discretion, the Court will consider all the circumstances which make it difficult to agree on an apportionment, such as local pride, commercial jealousy and rivalry, diverse interests, misapprehension of the real interests of different localities, and other conditions which might make a compromise necessary in order to accomplish any result.

The mere fact that in apportioning the members of the assembly the legislature, after giving to each county the full number to which its population entitles it, do not apportion the extra members to those counties having the largest surplus over the ratio of representation, but award them in some instances to those having a less surplus, does not show such an abuse of legislative discretion as will warrant the Court to declare the act invalid; at least when there is nothing to show that the legislature was influenced by improper considerations, and when the next United States census shows an increased population in those counties.

In determining whether an Apportionment Act is unconstitutional, because of inequalities between population and representation, the Court may consider the results which may follow a decision against the Act, such as the fact that any Apportionment Act may be brought before the Court for review, that greater inequalities exist in the next preceding Apportionment Act, which is yet more at variance with the Constitution than the one under discussion, and that if both these are declared unconstitutional the only remaining Apportionment Act would be one over a quarter of a century old, and therefore unfit to apply to present conditions of population.

[1] Reported in 31 N. E. Rep., 921. Decided in October, 1892.

STATEMENT OF FACTS.

The New York Constitution (Art. 3, Sec. 4) provides that "an enumeration of the inhabitants of the State shall be taken under the direction of the Legislature in the year 1855, and at the end of every ten years thereafter; and the said districts shall be so altered by the Legislature at the first session after the return of every enumeration that each senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and persons of color not taxed; and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a senate district, except such county shall be equitably entitled to two or more senators." Section 5 of the same article provides for 128 members of Assembly, and then continues: "The members of Assembly shall be apportioned among the several counties of the State by the Legislature, as nearly as may be, according to the number of their respective inhabitants, excluding aliens, and shall be chosen by single districts. . . . The Legislature, at its first session after the return of every enumeration, shall apportion the members of Assembly among the several counties of the State, in manner aforesaid, etc."

The Apportionment Act of 1892 (Laws, 1892, C. 397) exhibited some marked discrepancies in regard to the senatorial districts. The proper ratio was 180,899; but one district contained a population of 241,138, and another contiguous thereto only 105,720; yet both of these were in the city of New York, where, if anywhere, equality of apportionment could have been reached. A number of other districts also varied from the ratio by from 30,000 to 49,000. In the apportionment of assemblymen among the various counties there were also some notable discrepancies. Albany, with a population of 156,748, was given 4 members, while Monroe, with 181,230, was only allotted 3; and Rennselaer, with 121,679, and Queens, with 123,974, were each given the same number as Monroe. Duchess, with 75,078, was given two members, but St. Lawrence, with

80,679, and Chautauqua, with 73,884, were each allotted only one. These rather glaring discrepancies, however, are explained by the fact that when the assemblymen were apportioned among the counties by the integral ratio of population, there was a surplus of eleven not allotted, and these, instead of being given in strict order to those counties having the largest surplus over the ratio, were apportioned arbitrarily. The four having the highest surplus, however, received an extra member, and it would also appear that the Act as originally reported followed the strict mathematical method in apportioning the extra members to the counties having the highest surplus; but that the variations thereafter made were due to necessary compromises during its passage.

The Board of Supervisors of Monroe County having refused to district the county for the election of the three members of Assembly allotted to it, alleging as a reason for their refusal that the Act was unconstitutional, Charles F. Pond, a citizen of the county, applied to the Special Term of the Supreme Court for a writ of *mandamus* to compel the Board to district the county. This was denied in a long and careful opinion by RUMSEY, J., on the ground that the action of the supervisors was proper, because the Legislature had overstepped the limits of its discretion in making the apportionment,[1] and this decision was affirmed by the General Term,[2] MACOMBER, J., dissenting on the ground that the errors were not serious enough to vitiate the Act.

At about the same time the validity of the same Act was called in question in Oneida County on an application for a *mandamus* to the Secretary of State to compel him to issue the statutory notices under the Apportionment Act of 1879; but the application was denied on the ground that the Court had no power to interfere with the discretion of the Legislature, as expressed in the Act of 1892.[3]

[1] Peo. *ex rel.* Pond *v.* Board of Supervisors of Monroe County, 19 N. Y. Suppl., 978.

[2] Id. *v.* Id., 20 N. Y. Suppl., 97.

[3] Peo. *ex rel.* Carter *v.* Rice, Secretary of State, 20 N. Y. Suppl., 293.

Both cases were taken to the Court of Appeals, and judgment was there rendered in accordance with the syllabus previously given, affirming Peo. *v.* Rice, though on different grounds from those taken by the Supreme Court, and reversing Peo. *v.* Board of Supervisors.

GERRYMANDERING.

This word, in which, by a curious etymological freak, the memory of Mr. ELBRIDGE GERRY, one time Governor of Massachusetts, is most unjustly held up to the contempt of posterity, embalmed as neatly and as imperishably as a fly in amber, has been the theme of much discussion of late in the courts of several of the United States. The evil which it names has become so pronounced and prevalent that, as one judge has very tersely said, it is high time to put a stop to it. The only question is, Have the courts the necessary power?

It has been very strenuously urged that the judiciary has no power to review the acts of the legislature in apportioning its own members, that being a matter peculiarly within its own powers, and being a political, not a legislative act. This question, however, may be regarded as finally set at rest by the able arguments of ORTON, J., in the first Wisconsin Gerrymander Case, 81 Wis., 440; s. c. 51 N. W. Rep., 724, where he shows conclusively that not only have the courts themselves almost uniformly asserted this right, but that the legislatures of several States have sanctioned this assertion by requesting the opinion of the justices on matters relating to apportionment: See State *v.* Dudley, Ohio St., 437; State *v.* Newark, 40 N. J. L., 297; State *v.* Van Duyne (Neb.), 39 N. W. Rep., 612; Opinions of Justices, 3 Me., 477; 18 Me., 458; 43 Me., 587; 7 Mass., 523; 15 Mass., 537; 3 Pick. (Mass.), 517; 23 Pick., 547; 6 Cush. (Mass;), 575; 10 Gray (Mass.), 613; 142 Mass., 601; s. c. 7 N. E. Rep., 35; and of CASSODAY, J., in the Second Wisconsin Gerrymander Case, State *ex rel.* Lamb *v.* Cunningham, Secretary of State, 53 N. W. Rep., 35; as well as by the assumption of that fact in the cases hereafter cited. The dictum of the Court in Wise *v.* Bigger, 79 Va., 269, that laying off and defining Congressional districts is the exercise of a political and discretionary power, for which the legislature is amenable to the people, and that in 18 Me., 460, where the Court held that "if such power should be abused in any case, the remedy is with the people. Those guilty of any such outrage will be likely to become in time the victims of their own misconduct. In popular governments this, and the right which it may be believed the people will exercise of displacing bad servants, are great checks upon the abuse of power;" cannot prevail against such a weight of authority. And it is well that they do not represent the current of judicial opinion; for while they, especially the latter, evince a praiseworthy confidence in the readiness of the people to rebuke the misuse of legislative power, they also exhibit a peculiar blindness to the actual course of human events. "It is a condition, not a theory,"

that confronts the Court that has to deal with this question of gerrymandering. Both the object and the natural tendency of a gerrymander, as is well pointed out by Chief Justice MORSE in Giddings *v.* Blacker (Mich.), 52 N. W. Rep., 944, is to perpetuate the control of the government in the hands of a political party, even against the wishes, protests and votes of a majority of the people; and there are very few complaints made against it by the most upright men of that party. Objections to it come from the party so kept out of power. It has even been gravely urged as a reason for upholding a gerrymander, that the complaint against it was a political action, coming from the opposite party.

Even when in the course of time, the quondam cause of right triumphs, and the gerrymandering crew are ousted from their place of power, the mischief does not cease. No man ever saw a pendulum drawn back to the end of its beat, and then released, stop of its own accord in the middle of its oscillation. It swings straight to the other extreme. And, likewise, the first act of a party just coming into power is usually to rearrange the election districts so as to perpetuate its hold upon the government. This has apparently been the case in every State of the Union in which gerrymandering has been rife, and furnishes the strongest possible reason why the courts should exercise a power which the individual, or his aggregate, the people, has no desire to exert,, until he gets the shoe on the other foot, and finds that it pinches.

It being settled, then, that the courts have the power to review such acts, the next question is, how far are they reviewable? Naturally, whenever and to whatever degree they overstep the limits set by the Constitution. Here another effort has been made to nullify the power of the judiciary in this regard by claiming that the provisions of the Constitution in reference to apportionments are directory, and not mandatory. But the general current of authority is in favor of treating all constitutional provisions as mandatory: Peo. *v.* Lawrence, 36 Barb. (N. Y.), 177; Cooley, Const. Lim., 2d Ed., 181. The claim that the constitutional provisions in regard to apportionment are directory seems to be especially without foundation. Judge ORTON, in the first Wisconsin Gerrymander Case, State *ex rel.* Attorney General *v.* Cunningham, 81 Wis., 440; S. C., 51 N. W. Rep., 724, disposes of it very briefly. "That most dangerous doctrine, that these and other restrictions upon the power of the legislature are merely declaratory, and not mandatory, should not be encouraged, even to the extent of discussing the question. The convention, in making a constitution, had a higher duty to perform than to give the legislature advice;" and Judge PINNEY, with delicate satire, remarks in the same case: "It does not appear that the language used (in the debates of the convention) was employed by way of exhortation to the legislature to eschew the pernicious method of gerrymandering then recognized as an evil to be greatly deplored. It better suits the important character of the rights sought to be guarded, and the character and purpose of the instrument, to regard these provisions as mandatory, and not directory merely."

It has also been claimed that al-

though a transgression of a positive mandate of the Constitution is reviewable, yet the exercise of a discretionary power is not: Peo. *ex rel.* Carter *v.* Rice, *supra*; Peo. *ex rel.* Baird *v.* Broome, 20 N. Y. Suppl., 470. This rests upon a mistake, however. There is no such thing as an absolute, uncontrolled, unreviewable discretion vested in any man, or any body of men, under a constitutional government. All delegated powers must of necessity have limits; and if there be none expressed, there is always the implied qualification, that the powers granted be not abused. Even in affirming Peo. *v.* Rice, the Court of Appeals took care to say: "We do not intimate that in no case could the action of the legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the Constitution that it could be seen that it had been entirely lost sight of, and an intentional disregard of its commands, both in the letter and in the spirit, had been indulged in:" 31 N. E. Rep., on p. 929.

When the mandate of the Constitution is direct and positive, there is no room for discretion, and any transgression of it will render the Act unconstitutional. When the Constitution provides that the apportionment and districts so made shall remain unaltered until another enumeration of the population, the boundaries of the districts cannot be changed, either directly or as an incident of the alteration of town or city lines: Peo. *v.* Holihan, 29 Mich., 116; Kinney *v.* Syracuse, 30 Barb. (N. Y.), 349. A legislature cannot apportion a greater number of representatives than is allowed by the Constitution: State *v.* Francis, 26 Kans., 724. And when the Constitution prohibits the division of a country or district, any apportionment which violates that prohibition is unconstitutional and void: State *ex rel.*, Attorney-General *v.* Cunningham, Secretary of State, 81 Wis., 440; S. C., 51 N. W. Rep., 724. "Under negative and prohibitory constitutional provisions, the Legislature may often refrain from doing things which are not prohibited, but it can never do what is prohibited:" State *v.* Francis, *supra*.

When the Legislature is vested with discretion, its Acts are valid, so long as that discretion is not abused; and the courts will not investigate too closely, nor set the brand of unconstitutionality upon what may have been a mere error of judgment. "For the wisdom or unwisdom of what they have done within the limits of the powers conferred, they are answerable to the electors of the State, and no one else:" State *v.* Campbell (Ohio), 27 N. E. Rep., 884. It therefore becomes necessary to determine what those limits are, or, rather, to decide how far the Legislature may go without so far overstepping them as to warrant judicial interference. A degree of discretion is obviously conferred by those constitutional provisions which require that the apportionment shall be according to the number of inhabitants, or that the districts shall be, as nearly as may be, equal in population. There is some difference of opinion in respect to the latitude of this discretion; but it is acknowledged on all sides that it is impossible to attain mathematical exactness in this regard: Prouty *v.* Stover, 11 Kans., 235; State *ex rel.* Attorney-General *v.* Cunningham, 81 Wis.

440; S. C., 51 N. W. Rep., 724; State *ex rel.* Lamb *v.* Cunningham (Wis.), 53 N. W. Rep., 35; Giddings *v.* Blacker (Mich.), 52 N. W. Rep., 944; Peo. *ex rel.* Carter *v.* Rice (N. Y.), (the principle case), 31 N. E Rep., 921. And that all that is really requisite is the exercise of an honest and fair discretion. If there are any glaring inequalities of population or representation, it is a sure proof that such a discretion has not been exercised, but that the requirements of the Constitution have been willfully and intentionally disregarded and violated for partisan purposes; and it will warrant a decision that the apportionment is unconstitutional and void, without any direct proof of wrongful intent on the part of the Legislature: Peo. *v.* Canaday, 73 N. C., 198. "It is proper to say that perfect exactness in the apportionment, according to the number of inhabitants, is neither required nor possible. But there should be as close an approximation to exactness as possible, and this is the utmost limit for the exercise of legislative discretion. If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion, that evinces an intention on the part of the Legislature to utterly ignore and disregard the rule of the Constitution in order to promote some other object than a Constitutional Apportionment, then the conclusion is inevitable that the Legislature did not use any judgment or discretion whatever." ORTON, J., in State *v.* Cunningham, 81 Wis., 440; S. C., 51 N. W. Rep., 724.

In the case just cited the ratio of representation was 51,117 for each senate district, and 16.868 for each assembly district; but the apportionment made one senate district 68,000, and another 38,000; one assembly district 38,000, and another 7,000. This, in the language of Judge ORTON, was "a direct and palpable violation of the Constitution." As soon as this decision was rendered, the legislature made haste to pass another Act, which avoided the dismembering of assembly districts, another of the blemishes of the former Act, but made the discrepancy in population in some of the districts even greater than before; *e. g.*, 30,732 in one, and 65,952 in another. This also was held to be a violation of the Constitution in State, *ex rel.* Lamb *v.* Cunningham, 53 N. W. Rep., 35.

A very similar state of affairs prevailed in Giddings *v.* Blacker (Mich.) 52 N. W. Rep., 944. There nine counties, with an aggregate population of 97,000, had been united into one district, and eight other counties, contiguous thereto, into another district, with a population of but 40,000, the ratio of representation being 65,000; eight districts, with but 349,056 population, had been given the same representation as 695,717 in eight others; and the Democrats, with a majority of less than 5,000 in a total vote of about 400,000, had control of twenty-one senatorial districts to the Republicans' eleven, thus making it clear that the apportionment was only a political device, to even up matters with the latter, who for their part had previously so apportioned the State, in 1885, as to control twenty-one senatorial districts to eleven, and had given eight counties with 316,578 population the same represen-

tation as eight others, whose aggregate was 532,222. It is no wonder that the Court declared that a "constitutional discretion was not exercised in the Apportionment Act of 1891. The facts themselves demonstrate this beyond any controversy, and no language can make the demonstration plainer."

The same conclusion was arrived at in Peo. *v.* Canaday, 73 N. C., 198, where the city of Wilmington had been divided into three wards, with equal representation; but the first and second wards each contained about 4,000 votes, the third about 2,800. These discrepancies are hardly more strongly marked than some of those in the principal case, as for example, that of 135, 418 between the twelfth and thirteenth senatorial districts; and this fact, in view of the otherwise uniform current of authority, would tend to throw grave doubt upon the correctness of the decision there given, were it not for the claim in the opinion that the figures of population given here and in the prefixed statement, though found in the opinion of Judge RUMSEY at special term (19 N. Y. Suppl., 978), were not properly before the Court, and so could have no influence upon its decision. But this is not a valid excuse; for courts take judicial notice of the population of cities and towns according to the authorized census reports: Hawkins *v.* Thomas (Ind.) 29 N. E. Rep., 157; Bank *v.* Cheney, 94 Ill., 430; Peo. *v.* Williams, 64 Cal., 87; S. C., 27 Pac. Rep., 939; Peo. *v.* Wong Wang (Cal.) 28 Pac. Rep., 270, and of the local divisions of a county or State: Linck *v.* City of Litchfield (Ill.) 31 N. E. Rep., 123; State *v.* Powers, 25 Conn., 48; Goodwin *v.* Appleton, 22 Me., 453; Winnipiscogee Lake Co. *v.* Young, 40 N. H., 420. Such a claim is rendered especially peculiar in this case by the fact that the same opinion urges as a fact to be considered in upholding the validity of the apportionment of assemblymen, that three of the counties improperly preferred showed large gains of population, *according to the census*. If it could be referred to for one purpose, why not for the other?

It may be regarded, then, as settled beyond a doubt, that an apportionment act will be declared unconstitutional if there is any manifest abuse of the limited discretion reposed in the legislature by the Constitution; but there is some difference of opinion as to what constitutes such an abuse. In the cases cited from North Carolina, Michigan and Wisconsin, and in the principal case also, if we are permitted to look at the figures, which it is contended we have a perfect right to do, the abuse of discretion is so glaring as to leave no room for question, unless an exceedingly liberal and unwarrantable construction is put upon the words " as nearly as may be." Yet it was in this very manner that, after indulging in a curious and rather incomprehensible arithmetical juggle, the Court in the principal case disposed of the second objection to the validity of the act, that based upon the failure of the legislature to apportion the extra members of the Assembly in strict order to the counties having the largest surplus over the unit of representation. The constitutional requirement, that the apportionment of members of Assembly among the several counties should be, "as nearly as may be, according to the

number of their respective inhabitants," was boldly construed out of the way by the lower Court in Peo. *ex rel.* Carter *v.* Rice, 20 N. Y. Suppl., 293, with serene disregard of the canon of construction, that words shall be understood to have their ordinary signification, by holding, as nearly as can be ascertained from the argument, that these words do not mean as nearly as possible, or practicable, but as nearly as the legislature may think proper. The case cited in support of this view, of conformity of procedure in Federal courts to that in State courts, has no real analogy. A mere matter of procedure, and one of substantive right, are wholly different in their nature, and a degree of discretion may well be allowed in the former that would be ruinous in the latter. The Court of Appeals did not adopt this reasoning, but declared the words to be "a direction addressed to the legislature in the way of a general statement of the principles upon which the apportionment shall be made." But Judge ANDREWS, in his dissenting opinion, concurred in by Judge FINCH, clearly points out the fallacies and dangers of such a doctrine. "The argument urged upon us that the words 'as nearly as may be' give a discretion to the legislature, if it means anything as applied to the circumstances of this case, means that the legislature may disregard the plain meaning and mandate of the Constitution. . . . When the Court can see that the rule of the Constitution was not in fact applied, and the circumstances for its application were clear and unequivocal, then there is nothing left to the Court but to declare the apportionment void. The suggestion that the circumstances under which legislatures act in such matters give opportunity for the play of passion and prejudice, and therefore this must be considered in determining the validity of an apportionment act, seems to me to have no place in this discussion. The very object of constitutional restrictions is to establish a rule of conduct which cannot be varied according to the passion or caprice of a majority, and to fix an immutable standard applicable under all circumstances. If a departure from the fundamental law by legislatures can in one case be justified by the frailties of human nature, and the constitutionality of an act, may be made to depend in one case upon such a consideration, the constitutionality of all legislation may be governed by the same rule. I have said the very object in imposing restraints in the Constitution is to protect great principles and interests against the operation of such eccentric and disturbing forces. The discretion of the legislature, if any, in apportioning members ends where certainty begins, and that point was reached when the counties having the largest remainders were ascertained."

The full effects of the decision of the majority of the Court is best seen in looking at the facts of the case as they appear in the prefixed statement. Here one county, with 181,230 population, has three members, while another county, with a population of nearly 15,000 less, has four; one with 75,078 has two, while another, with 5,000 more, has but one. It needs a deal of argument to prove this a just and legal exercise of discretion.

This very point arose in Board of Supervisors of Houghton Co. *v.* Blacker (Mich.) 52 N. W. Rep., 951, and was there thus tersely disposed of: "There can be no legal discretion, under the Constitution, to give a county of less population than another a greater representation. Such action would be arbitrary and capricious, and against the vital principle of equality in our government, and it is not intended or permitted by the Constitution; nor could such action lead to any good result. There can be found no excuse for it." It is to be feared, therefore, that while the majority opinion in the principal case asserts the validity of the new apportionment act of 1892, it fails to prove it.

The Court itself seems to have felt the inherent weakness of the arguments upon which it relies, for it introduces a number of extraneous considerations to prove the wisdom of its decision. Chief among these are the dire consequences which would flow from a decision against the constitutionality of the act, compelling a declaration that the preceding apportionment act was invalid, and thus throwing the elections back upon an act more than a quarter of a century old. But, as Judge ANDREWS says, "The attempt to justify the apportionment of 1892 by the fact asserted (which seems to be true) that the apportionment of 1879 was subject to as great or greater objection on the score of inequality than the later act, fails because the fact is irrelevant. It is one thing that a legislature has disregarded its duty on a former occasion, and that the people have acquiesced in the usurpation, and quite a different and a much more serious thing if such a disregard of constitutional limitation should receive judicial sanction." Two wrongs never made a right. The Court has no business to concern itself with consequences, when the path of duty is clear. It is in no way responsible for them. The Supreme Court of Michigan in a similar dilemma boldly asserted both acts to be "tarred with the same stick," and set both aside; and Chief Justice MORSE emphatically declared, "The consequences of this decision are not for us. It is our duty to declare the law, to point out the invasion of the Constitution and to forbid it:" Giddings *v.* Blacker, *supra*, p. 948.

This same argument *ab inconvenienti* was presented in a somewhat different form by Judge WINSLOW in a dissenting opinion in State, *ex rel.* Lamb *v.* Cunningham (Wis.) 53 N. W. Rep., p. 59, where he urges that a decision against the act would brand every legislature since 1852 as *de facto* merely, inasmuch as every prior apportionment act had contained greater discrepancies; but it is hard to see the exact force of this, since the acts of a *de facto* legislature are valid, on grounds of public policy: ORTON, J., in State *v.* Cunningham, 51 N. W. Rep., on p. 729. See also Auditor General *v.* Board of Supervisors (Mich.) 51 N. W. Rep., 490–491. He also lays much stress upon contemporaneous construction, shown by these same apportionments (which, however, would be all the stronger reason for putting a stop to the thing before it went any farther); but the strongest ground of objection that he adduces is the danger that the courts, by continued adverse decisions, may at last substitute their apportion-

ment for that of the legislature. At present, however, there seems to be but little cause for apprehension on this score, and it will be time enough to consider it when the evil becomes pressing.

The validity of an Apportionment Act may be called in question by either *quo warranto* (Peo. *v.* Canady, 73 N. C., 198), *mandamus* (Peo. *v.* Rice, 31 N. E. Rep., 921), or injunction (State *ex rel.* Att.-Gen. *v.* Cunningham (Wis.), 51 N. W. Rep., 724; S. C., 81 Wis., 440). The proper mode of procedure is, of course, at the relation of the attorney-general; but if that officer refuses to act, then either *mandamus* or injunction may be brought at the relation of a private citizen; for otherwise such a refusal would prevent the people from obtaining redress for such an infringement upon their rights and liberties: Giddings *v.* Blacker (Mich.), 52 N. W. Rep., 944; State *ex rel.* Lamb *v.* Cunningham (Wis.), 53 N. W. Rep., 35. In any case, however, the suit must be brought against an officer who is entrusted with duties in relation to the matter that are purely ministerial. There can be no direct judicial remedy, as against an unconstitutional apportionment, even by and through the extraordinary jurisdiction of the Court, unless the controversy can be made in some form with and against some officer whose duties are ministerial, and who is therefore amenable to the coercive power of the Court to compel execution of its judgment or decree. If the respondent is not, as to the matter in hand, a mere ministerial officer, owing mere ministerial duties, if he is vested with political or discretionary power subject to no limitation, the jurisdiction of the Court cannot be maintained; for the Court will not render a judgment or decree that it has no possible right to enforce." PINNEY, J., in State *v.* Cunningham (Wis.), 51 N. W. Rep., p. 735.

R. D. S.

COMMONWEALTH *v.* TIERNEY. SUPREME COURT OF PENNSYLVANIA.[1]

SYLLABUS.

Liquor License Law—Social Clubs—Device to Evade the License Law.

A wholesale liquor dealer whose license had been withheld, was indicted soon after for selling liquor in the same old bar-room without a license. His defence was that he was not selling on his own account but as steward of the Ellsworth Club, and that no sales were made to any but members of the club unless brought there by members. The club room was only a space of about six feet square, partitioned off from the old bar-room, although over one hundred members were claimed. The building was owned by the defendant, who lived there with his family. All liquors, it was alleged, belonged to the club, merely being dispensed by the defendant as steward. Each member had a key to the club room and paid an initiation fee of twenty-five cents and ten cents as weekly

[1] 24 Atl. Rep., 64; 1 Adv. (Leg. Int.), 584. See Editorial Notes (Infra).